COLORADO
Department of Revenue
Taxation Division

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PLR-14-006

October 2, 2014

XXXXXXXXXXXX
Attn: XXXXXXXXX
XXXXXXXXXXXX
XXXXXXXXXXXX

Re: Food at Retirement Communities

Dear XXXXXXXXXX,

You submitted on behalf of XXXXXXXXXXXX ("Company") a request for a private letter ruling to the Colorado Department of Revenue ("Department") pursuant to Department Rule 24-35-103.5. This letter is the Department's private letter ruling.

Issue

1. Is food provided as part of a meal plan to residents of a retirement community exempt as food for domestic home consumption?
2. Is food that Company purchases from suppliers and used to provided meals to residents exempt as food for home consumption?

Conclusion

1. Charges by Company to residents and to guests of residents for meals are subject to state and state-administered local sales tax.
2. Company's purchase of food and food products from suppliers that are used to provide meals to residents and to guests of residents are exempt either as ingredients of meals prepared by Company or as wholesale purchases of food for resale to residents.

Background

Company is in the business of operating a number of retirement communities and provides a variety of services for retirement communities. These communities typically consist of a large apartment building that includes individual apartments, common areas, dining area, kitchen facilities (both in individual apartments and for serving residents using the dining area), exercise rooms, game and entertainment areas, as well as staff offices. Residents are typically long-term residents and are over the age of sixty. Residents pay a monthly fee to live at the retirement community, which includes the right to occupy their apartment, enjoy the amenities

and activities at the facility, and also includes a fixed-dollar meal credit. The price of each meal they consume is debited against the monthly credit. If the resident exceeds the credit, they are charged a la carte for any additional meals; if a resident does not use their entire monthly credit, it does not carry over to the next month. Company currently collects and remits Colorado sales tax on the amount it collects from residents for the meal credit and any amount paid by residents for meals in excess of the monthly credit. Company purchases the food products used to prepare the meals and employs the cooking staff to prepare and serve the meals. The distributor from whom Company purchases food products currently charges Company Colorado sales tax.

Discussion

Company asserts that meals served to residents are exempt as food for domestic home consumption and, therefore, its purchases from suppliers are also exempt. We begin then by considering whether the meals served to residents are exempt sales of food for domestic home consumption. There are two principal statutes that guide our determination. First, Colorado imposes sales and use tax on the sale, use, storage, or consumption of tangible personal property.[1] Although food is tangible personal property and would otherwise be subject to sale and use tax, Colorado law exempts the sale of "food" if it is for "domestic home consumption".[2] Colorado defines "food" by adopting the definition of food used by the U.S. Department of Agriculture's (USDA) Supplemental Nutrition Assistance Program (SNAP) and Woman, Infants and Children (WIC) Program.[3] In general, these federal statutes define food to mean food and food products for home consumption.[4] The most common example of food for home consumption is food products purchased at grocery stores, including frozen prepared meals, which are consumed at home.[5]

However, certain foods are excluded from the federal definition of food. One important exclusion is "hot food and hot food products for immediate consumption".[6] Company regularly serves hot food and food products at every meal. Moreover, §39-26-102(4.5), C.R.S. excludes from the definition of exempt food, among other things, carbonated water marketed in containers, prepared salads and salad bars, and cold sandwiches.[7] Again, these items are served by Company to residents.

It is our understanding that meals served to residents are typically served hot for immediate consumption. Although it may be the case that some meals, or portions of the meals, may be served at room temperature (i.e., not hot), such as in the case of a

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1 §39-26-104(1)(a) and 204, C.R.S. State-administered local tax jurisdictions have the choice to tax food sold for domestic home consumption. §29-2-105, C.R.S. All of the counties in which Company's retirement communities are located exempt sales of food for domestic home consumption. Cities in which Company operates are home rule cities and are responsible for the administration of their sales and are use taxes and are not bound by this ruling.

2 §39-26-707, C.R.S.

3 See, §39-26-102(4.5), C.R.S. and 7 U.S.C. §2012(k).

4 7 U.S.C. §2012(k)(1)

5 Department Rule 39-26-102.4.5. Food purchased at a grocery store by a business for use in the business (e.g., office party) is not exempt because it is not consumed at home.

6 7 U.S.C. §2012(k)(1)

7 §39-26-102(4.5), C.R.S.

dessert or muffin, meals or some significant portion of meals, are typically served hot. We think the statute does not require us to parse each element of a meal into whether it is served hot or cold. We think it sufficient that the basic model is to serve meals that are typically, but not always, hot. Thus, we conclude that food sold by Company to residents is not exempt as food for domestic home consumption.

As part of our review, we considered subsection 2012(k)(3) of the federal definition of food which states that "food" includes:

> in the case of those persons who are sixty years of age or over or who receive supplemental security income benefits or disability or blindness payments under title I, II, X, XIV, or XVI of the Social Security Act [42 U.S.C. 301 et seq., 401 et seq., 1201 et seq., 1351 et seq., 1381 et seq.], and their spouses, meals prepared by and served in senior citizens' centers, apartment buildings occupied primarily by such persons, public or private nonprofit establishments (eating or otherwise) that feed such persons, private establishments that contract with the appropriate agency of the State to offer meals for such persons at concessional prices subject to section 2018 (h) of this title, and meals prepared for and served to residents of federally subsidized housing for the elderly.[8]

We reviewed whether this provision would apply to meals served by Company. Most residents are over the age of sixty and most live within an apartment-like structure. We contacted the Colorado Department of Human Services, who advised us that residents of a nursing home or other similar institution are not eligible to receive federal food assistance under this provision.[9] Moreover, our review of the applicable federal regulations suggests a similar conclusion.[10]

The second statute at issue imposes tax on food served by restaurants and other similar businesses "at which prepared meals and drink is regularly sold".[11] Company operates a commercial enterprise that regularly sells prepared meals and drinks. Thus, these meals fall within the ambit of this statute.

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8 7 U.S.C. § 2012(k)(3).

9 For example, the Department of Human Services does not consider food sold to individuals in an institutional setting to be included in this subsection (2012(k)(3)) regardless of whether served hot.

10 7 C.F.R §271.2 states "*Eligible Food* means...(3) Meals prepared and delivered by an authorized meal delivery service to households eligible to use coupons to purchase delivered meals; or meals served by an *authorized* communal dining facility for the elderly, for SSI households or both, to households eligible to use coupons for communal dining;" "*Communal dining facility* means a public or nonprofit private establishment, approved by FNS, which prepares and serves meals for elderly persons, or for supplemental security income (SSI) recipients, and their spouses, a public or private nonprofit establishment (eating or otherwise) that feeds elderly persons or SSI recipients, and their spouses, and federally subsidized housing for the elderly at which meals are prepared for and served to the residents. It also includes private establishments that contract with an appropriate State or local agency to offer meals at concessional prices to elderly persons or SSI recipients, and their spouses." [emphasis added] Company is not a communal dining facility because it is not "authorized", "public" or "nonprofit".

11 §39-26-104(1)(e), C.R.S.

We considered in this analysis whether the decisions in *Colorado College v Heckers,* 517 P2d 419 (Colo. 1973) and *B.P.O.E. Lodge No. 804 v. State of Colorado, Department of Revenue*, 41 Colo App 88, 582 P2d 1068 (Colo. 1978) apply to meals served to residents of the retirement community. In *Colorado College*, the court held that food served to residents of college dormitories and at students unions and occasional guests were not "restaurants" because the statute referred to commercial entities regularly serving food "to the public". The court held that the college did not regularly serve meals "to the public". A few years later, the court reached a similar conclusion in *B.P.O.E. Lodge*, in which the court held that food served by a social club was not generally serving the public.

However, a year after the decision in *B.P.O.E. Lodge*, the legislature amended subsection §39-26-104(1)(e), C.R.S. (defining restaurants and other similar entities) to remove the phrase "to the public". The legislature also amended the reference to "clubs" in the list of entities whose prepared meals are taxable to "social clubs [and] nightclubs". This deletion of "to the public" suggests that the legislature intended to include entities that regularly sell meals even though the entity does not serve meals "to the public". The inclusion of social clubs also suggests the legislature intended to overturn the court's rationale *B.P.O.E. Lodge.*

Nevertheless, the Department issued in 1980 a policy position stating that the elimination of the phrase "to the public" did not alter the application of the rationale set forth in *Colorado College* and *B.P.O.E. Lodge*. We could not locate any explanation for this policy position. We re-examined the rationale of these cases in light of these statutory changes and believe that the better interpretation is that the deletion of the phrase "to the public" effectively eliminates the crux of the court's rationale in both cases, particularly in light of the addition of "social club[s]" after the decision in *B.P.O.E. Lodge* (which is a social club), as entities whose meals are subject to tax.

Related to these two court decisions is Department's Special Rule 13, which states, in pertinent part:

> Boarding houses, which serve meals only to persons regularly boarding there and not to the public, should not collect sales tax on the meals. Such boarding houses are exempt from sales tax on their purchases of food, but must pay sales tax on all non-food items.[12]

This regulation was first adopted in 1980, the same year that the Department issued its policy position regarding *Colorado College* and *B.P.O.E. Lodge*. Because of the specific reference in the rule to "not to the public", we believe this rule is premised on same 1980 policy position that we re-examined and concluded does not correctly reflect the current statutory definition of restaurant. Therefore, we decline to extend the regulation to retirement communities.

Having concluded that meals and drinks served to residents are not exempt as food for domestic home consumption, we next turn to whether Company's purchases of food and food products from suppliers are subject to sales tax. In this review, we first considered whether the true object of the transaction between Company and

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[12] Department Sales Special Rule 13.

residents should be treated as a service provider rather than a retailer of meals. If the true object of the transaction is the provision of service, then Company would be treated as the consumer of the food, just as it is considered the consumer of other tangible personal property used to provide service. The provision of meals to residents is not treated as a retail sale. On the other hand, if the true object of the transaction is treated as a mixed transaction involving both retirement living accommodations and a retail sale of meals, then the provision of meals to residents would be treated as a retail sale. This is an important distinction because in the former case, Company's purchases from suppliers would not be exempt either as wholesale purchases or as ingredients for processing tangible personal property (because both exemptions, as discussed below, require the buyer to resell the goods). For example, we have previously offered guidance that hospitals and other similar medical facilities are predominantly providers of medical services and patient meals are only incidental to such service.[13] As such, hospitals are treated as the ultimate consumers of tangible personal property used to provide its service, including patient meals. Therefore, a hospital's purchases of meals from suppliers are not exempt wholesale purchases for resale or exempt as ingredients for manufactured property sold at retail.

This is a close question in our view, but we conclude that the true object of the transaction between Company and residents is a mixed transaction involving both services and retail sales of meals. Specifically, Company is a provider of mixed transactions that include the rental of real property (lease of accommodations), nontaxable services (e.g., healthcare, entertainment), and, importantly, retail sales of meals. Unlike the transaction for hospital services, in which the dominant purpose and "true object" of the transaction is the provision of medical services and meals are only an incidental component of that service, resident meals at this retirement community are a major component of the overall transaction. Company provides, in a simplistic sense, "room and board". "Board" is a significant element of the transaction between Company and its residents. Therefore, we conclude Company engages in retail sales of meals to residents.

Because Company is treated as a retailer of the meals, we turn next to whether Company's purchases of food and food products from suppliers are exempt. Two exemptions are important in this regard. Colorado exempts purchases of ingredients and components used by businesses engaged in the compounding of such ingredients or components into tangible personal property for sale or profit.[14] Food ingredients purchased by Company that is then processed in its kitchens into a prepared food product are exempt.

The second exemption at issue is the exemption of wholesale purchases for resale.[15] Food and food products that are not compounded by Company into a prepared meal, but, rather, simply resold to residents (e.g., fruit, prepared foods

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13 Department Private Letter Ruling 10-003.

14 §39-26-102(20), C.R.S. Both this exemption and the wholesale purchase exemption require that there be a subsequent retail sale. *Carpenter v. Carmen Distribution Company 111 Colo. 566, 144 P.2d 770 (1943)* Because we conclude that Company is a retailer of the meals, this element of the exemption is satisfied.

15 Sales tax applies only to retail sales. §39-26-104(1)(a), C.R.S. Retail sales do not include wholesale sales. §39-26-102(9), C.R.S.

such as bread, and premade meals prepared by suppliers) are exempt as a wholesale purchase.[16] Thus, we conclude that Company's purchases of food and food products from suppliers for the purposes described above are exempt from state and state-administered sales and use taxes.

Miscellaneous

This ruling applies only to sales and use taxes administered by the Department. Please note that the Department administers state and state-collected city and county sales taxes and special district sales and use taxes, but does not administer sales and use taxes for self-collected home rule cities and counties. You may wish to consult with local governments which administer their own sales or use taxes about the applicability of those taxes. Visit our web site at www.colorado.gov/revenue/tax for more information about state and local sales taxes.

This ruling is premised on the assumption that Company has completely and accurately disclosed all material facts. The Department reserves the right, among others, to independently evaluate Company's representations. This ruling is null and void if any such representation is incorrect and has a material bearing on the conclusions reached in this ruling. This ruling is subject to modification or revocation in accordance to Department Regulation 24-35-103.5.

Enclosed is a redacted version of this ruling. Pursuant to statute and regulation, this redacted version of the ruling will be made public within 60 days of the date of this letter. Please let me know in writing within that 60 day period whether you have any suggestions or concerns about this redacted version of the ruling..

Sincerely,

Neil L. Tillquist
Colorado Department of Revenue

[16] Raw food that is compounded into a prepared meal is not exempt under the wholesale exemption because that exemption applies only when the ingredient or compound is resold in an unaltered state to the customer. *A.B. Hirschfield Press, Inc. v. City & County of Denver*, 806 P.2d 917, 920. Nevertheless, such purchases are exempt as an ingredient or component of a compounded product.